

Office of Chief Counsel
Internal Revenue Service

memorandum

CC:NER:NJD:NEW:TL-N-4233-00

RABaxer

date: SEP 14 2000

to: Compliance Territory Manager
Robert Shore

from: District Counsel, New Jersey CC:NER:NEW

subject: [REDACTED]
Dissolution of Acquired Subsidiaries
Statute of Limitations

This memorandum supplements and revises, in part, the advice furnished to you in our previous memorandum dated August 22, 2000. That memorandum was prepared in response to your request for assistance in determining who may sign Forms 872, extension of the statute of limitations, for two dissolved corporations. This memorandum is based upon the facts as set forth in the August 22, 2000 memorandum. If the factual statement in that memorandum has changed, please notify this office so that we may determine the effect, if any, on the advice rendered.

DISCLOSURE STATEMENT

This advice constitutes return information subject to I.R.C. § 6103. This advice contains confidential information subject to attorney-client and deliberative process privileges and if prepared in contemplation of litigation, subject to the attorney work product privilege. Accordingly, the Examination or Appeals recipient of this document may provide it only to those persons whose official tax administration duties with respect to this case require such disclosure. In no event may this document be provided to Examination, Appeals, or other persons beyond those specifically indicated in this statement. This advice may not be disclosed to taxpayers or their representatives.

This advice is not binding on Examination or Appeals and is not a final case determination. Such advice is advisory and does not resolve Service position on an issue or provide the basis for closing a case. The determination of the Service in the case is to be made through the exercise of the independent judgment of the office with jurisdiction over the case.

ISSUE

Who may execute a Form 872 extension of the statute of limitations for two liquidated subsidiary corporations.

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DISCUSSION

Upon reconsideration, it appears that the liquidations of [REDACTED] and [REDACTED] into [REDACTED] may have been I.R.C. § 332 liquidations. Under Treas. Reg. § 1.332-2(c), a status of liquidation exists when the corporation ceases to be a going concern and its activities are merely for the purpose of winding up its affairs, paying its debts and distributing any remaining balance to its shareholders. Legal dissolution of the corporation is not required. Although it is essential that a plan of liquidation exist at the time the first distribution is made, informal adoption of measures which, in fact, constitute acts of liquidation may be enough. See Rev. Proc. 90-52, 1990-2 C.B. 626.

Although we do not have all the facts necessary to rule on whether there is a liquidation under I.R.C. § 332, we suggest that you treat the liquidations either as section 332 liquidations or as upstream mergers under state law, for protective purposes. In either case, the parent corporation is considered the successor, provided the parent corporation is primarily liable for the debts of the liquidated subsidiary under state law. The Service holds that a successor under state law may validly sign an extension agreement on behalf of the transferor (predecessor) corporation for a period before the transfer. Rev. Rul. 59-399, 1959-2 C.B. 488. The courts agree that a successor corporation may execute a waiver on behalf of its predecessor. See Popular Library Inc. v. Commissioner, 39 T.C. 1092 (1963); and Union Bleachery v. Commissioner, 97 F.2d 226 (4th Cir. 1938).

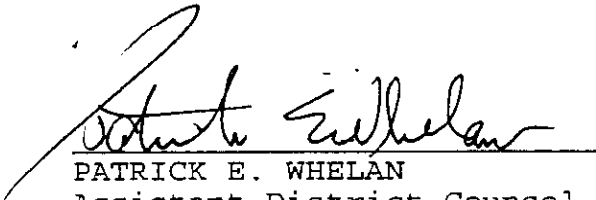
Based on the foregoing, we believe [REDACTED] should be treated as a successor for protective purposes. In addition, [REDACTED] should be treated as secondarily liable as a transferee because transferee at law includes a successor of a corporation as well as a shareholder of a dissolved corporation. Treas. Reg. § 301.6901-1(b). Under GCM 34,970, Primary Liability and Transferee Liability of a Successor Corporation, 1-4092 (July 31, 1972), the Service takes the position that a successor in interest is both primarily liable, providing state law provides for such liability, and liable as a transferee. Under Rev. Rul 59-399, supra, the Service permitted a surviving corporation in a statutory merger to execute a Form 872 consent (the consent form to be signed by a taxpayer that is primarily liable) as well as a Form 977 Consent.

We previously indicated that [REDACTED], as agent for the consolidated group, should sign the Forms 977 and 2045. We were advised that this is an incorrect application of Treas. Reg. § 1.1502-77(a). That regulation provides that the parent shall act

as agent for the subsidiaries in all matters relating to tax liability for the consolidated return year for which it was the common parent. In this case, [REDACTED] was not the parent of the subsidiaries at the time the liabilities were incurred. Furthermore, the liabilities incurred were not liabilities of the group since they were incurred by stand-alone corporations. Accordingly, [REDACTED] should sign the Forms 977 and 2045, not [REDACTED].

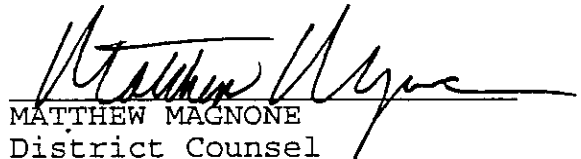
In addition, for protective purposes, we suggest that [REDACTED] also sign Forms 872. This is because an argument can be made, under case law, that a corporation liable as a successor under the merger statutes is not a transferee at law. See Missile Systems Corp. of Texas v. Commissioner, T.C. Memo. 1964-212. In this case, however, [REDACTED] might be a transferee at equity under the trust fund theory if its subsidiaries were insolvent or rendered insolvent at the time of the transfer. See Dillman v. Commissioner, 64 T.C. 797 (1975); and Pasadena ENT Clinic, P.S. v. Commissioner, T.C. Memo. 1996-448.

If you have any questions or need further information, please contact Robert A. Baxer on (973) 645-2598.



PATRICK E. WHELAN
Assistant District Counsel

NOTED:



MATTHEW MAGNONE
District Counsel

cc: Frank Attianesi, Team Coordinator
Group 1142

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This memorandum has been prepared in response to your request for assistance in determining who may sign Forms 872, extension of the statute of limitations, for two dissolved corporations. This memorandum is based upon the facts as outlined below. If the factual statement is incorrect, please notify this office so that we may determine the effect, if any, on the advice rendered.

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ISSUE

Who may execute a Form 872 extension of the statute of limitations for two liquidated subsidiary corporations.

FACTS

The facts as we understand them are as follows:

[REDACTED] (" [REDACTED] ") (EIN: [REDACTED]) is the common parent of a consolidated group, and is presently under examination for its calendar years [REDACTED] through [REDACTED].

On [REDACTED], [REDACTED] acquired [REDACTED]% of the stock of [REDACTED] (" [REDACTED] ") (EIN: [REDACTED]). [REDACTED] was the [REDACTED]% owner of [REDACTED] (" [REDACTED] ") (EIN: [REDACTED]) a possessions corporation operating in Puerto Rico and [REDACTED] (" [REDACTED] ") (EIN: [REDACTED]) a foreign sales corporation.

Effective with the acquisition [REDACTED] elected to file a consolidated return with [REDACTED] for the calendar year [REDACTED] and all subsequent years through [REDACTED].

[REDACTED] continued to file separate tax returns until its dissolution on [REDACTED]. [REDACTED] continued to file separate tax returns until its dissolution on [REDACTED]. In both instances, all remaining assets of the dissolved companies were distributed in complete liquidation to their [REDACTED]% shareholder [REDACTED].

[REDACTED] was incorporated under the laws of the state of Massachusetts and [REDACTED] was incorporated under the laws of the Virgin Islands.

An issue has been raised in the [REDACTED] tax year of [REDACTED] and is currently docketed in the Tax Court as Docket No. [REDACTED]. This issue recurs in subsequent years and the taxpayer has orally agreed to apply the results of the Tax Court action for [REDACTED] to all subsequent years.

You wish advice on how to extend the statute of limitations for the currently protected pre-acquisition years of [REDACTED] and [REDACTED].

At the present time, you have Forms 872 for the [REDACTED], [REDACTED], and [REDACTED] tax years of [REDACTED] signed by [REDACTED] (" [REDACTED] "), Treasurer. The last Form 872 secured was signed by [REDACTED] on [REDACTED] and extended the statute of limitations for all years until [REDACTED].

Additionally, you have Forms 872 for the [REDACTED], [REDACTED], and [REDACTED] tax years of [REDACTED] signed by [REDACTED] (" [REDACTED] "), Treasurer. The last Form 872 secured was signed by [REDACTED].

██████ on ██████ and extended the statute of limitations for all years until ██████.

DISCUSSION

The situation you describe is covered by Rev. Rul. 83-41, 1983-1 C.B. 349. Holding 4 in that Rev. Rul. indicates that in states in which a dissolved corporation continues in existence for purposes of winding up its affairs, any authorized officer of the corporation may sign a consent during the period the corporation continues in existence under state law. See also, Rev. Rul. 71-467, 1971-2 C.B. 411.

We must look to the law of the jurisdiction in which each corporation was incorporated to determine the effect of the dissolution on the continued existence of the corporation.

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Since, each corporation will remain in existence for a period of three years after dissolution under the laws of ██████ and the ██████ respectively, the holding in Rev. Rul. 83-41 applies in your case.

Forms 872 signed by an authorized officer of a dissolved corporation within the three year period after dissolution are valid. Epstein v. Commissioner, 17 T.C. 1034 (1951); Field v. Commissioner, 32 T.C. 187 (1959), affd. 286 F.2d 960 (6th Cir. 1960).

At this time, it is our opinion that the statute of limitations of ██████ and ██████ have been effectively extended to ██████.

While you have not requested advice on the issue of transferee liability, we offer the following observation for your consideration.

For each dissolved corporation a suit ██████ or an action or proceeding ██████ must be commenced within three years from the time of dissolution for the continued corporate existence to carry on beyond the three year period.

For [REDACTED] that period expired on [REDACTED] and for [REDACTED] that period will expire on [REDACTED].

No notice of deficiency has been issued to [REDACTED] for any of the tax years currently under extension. Consequently, [REDACTED] has gone completely out of existence for all purposes as of [REDACTED]. Any further Form 872 will be completely invalid if signed after that date. Camp Manufacturing Co. v. Commissioner, 25 B.T.A. 537 (1932).

Case law from various jurisdictions has generally determined that the action or proceeding to be commenced in the three year period has to be the issuance of a statutory notice of deficiency. Bahen & Wright, Inc. v. Commissioner, 176 F.2d 538 (4th Cir. 1949); American Standard Watch Co., Inc. v. Commissioner, 229 F.2d 672 (2nd Cir. 1956); The Bared & Cobo Company, Inc. v. Commissioner, 77 T.C. 1194 (1981).

The mere signing of extensions of the statute of limitations has been held not enough to constitute a proceeding. Paramount Warrior, Inc. v. Commissioner, T.C. Memo. 1979-400, affd. without published opinion 606 F.2d 522 (5th Cir. 1979); Wheeler's Peachtree Pharmacy, Inc. v. Commissioner, 35 T.C. 177 (1960), acq. 1961-2 C.B. 5. The fact that there is an ongoing audit does not rise to the level of a proceeding. Malone & Hyde, Inc. v. Commissioner, T.C. Memo. 1992-661. Additionally, the Tax Court action for the [REDACTED] year of [REDACTED] is irrelevant and cannot be relied upon to create an "action or proceeding" for the subsequent years. Malone & Hyde, Inc. v. Commissioner, *supra*.

As there is no intention to issue a statutory notice of deficiency to [REDACTED] prior to [REDACTED], it too will go completely out of existence as of that date and there will be no authority to secure a further Form 872 after [REDACTED].

The consequence of not issuing a statutory notice of deficiency to [REDACTED] and [REDACTED] prior to the end of the three year period after dissolution will be that the Service may not proceed directly against either corporation. If a notice of deficiency were to be issued after the expiration of the three year period, neither corporation will have a legal existence. There will be no one with the requisite authority to file a petition to Tax Court and any action in Tax Court will have to be dismissed for lack of jurisdiction. Badger Materials, Inc. v. Commissioner, 40 T.C. 1061 (1963).

Additionally, since each corporation no longer has any assets, in each instance, the remaining assets after dissolution being distributed to [REDACTED], there is nothing available to satisfy any potential tax liabilities of [REDACTED] or [REDACTED] should a liability be determined.

I.R.C. § 6901(a)(1) provides for liability for income tax of a transferee of property and I.R.C. § 6901(a)(2) provides liability of a transferee for taxes (other than income, estate, or gift) if such liability arises upon the liquidation of a corporation. In general the statute of limitations for assessment of transferee liability is within one year after the expiration of the period of limitations against the transferor.

In this case, [REDACTED] is a transferee of both [REDACTED] and [REDACTED] and will be liable for any determined liabilities of each company. Consideration should be given to securing a Form 2045, Transferee Agreement, and Form 977, Consent to Extend the Time to Assess Liability at Law or in Equity for Income, Gift, and Estate Tax Against a Transferee or Fiduciary.

The transferee liability arose at the time of liquidation of each corporation and the transfer of assets to [REDACTED]. It is noted that [REDACTED] was part of a consolidated return at that time. As such, the Forms 2045 and 977 would have to be signed by [REDACTED] as the agent for [REDACTED]. Treas. Reg. § 1.1502-77 provides that the common parent is the sole agent to act on behalf of its subsidiaries for all purposes including filing all extensions of time.

The Forms 2045 and 977 should be secured prior to the expiration of the statute of limitations on [REDACTED] and [REDACTED]. However, you may commence the transferee action within one year after the expiration of the statute of limitations, as extended, for each corporation should the Forms 2045 and 977 not be secured.

CONCLUSION


For the reasons set forth above, it is our opinion that any authorized officer of the liquidated corporations may sign a consent to extend the statute of limitations during the period the corporation continues in existence under state law.

For [REDACTED] that period expired on [REDACTED] and no further Forms 872 may be secured. The statute of limitations for [REDACTED] cannot be extended past the current extended date of [REDACTED].

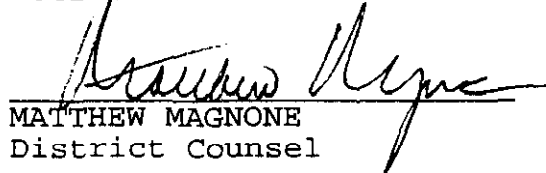
For [REDACTED], you may secure another Form 872 to extend the statute of limitations beyond [REDACTED], but it must be secured prior to [REDACTED]. No further extensions of the statute of limitations can be secured after [REDACTED].

It is our recommendation that Forms 2045 and 977 be secured from [REDACTED] with respect to all of the tax years currently under extension for [REDACTED] and [REDACTED].

If you have any questions or need further information, please contact Robert A. Baxer on (973) 645-2598.


PATRICK E. WHELAN
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